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METROPOLITAN INTERPRETERS  
12 AND TRANSLATORS, INC. AND J.C.

13 **UNITED STATES DISTRICT COURT**  
14 **SOUTHERN DISTRICT OF CALIFORNIA**  
15

16 M.G., *et al.*, individuals,

17 Plaintiffs,

18 vs.

19 METROPOLITAN  
INTERPRETERS AND  
20 TRANSLATORS, INC., a  
corporation, J.C., an individual, R.P.,  
21 an individual, C.G., UNITED  
STATES OF AMERICA, SONDR  
22 HESTER, an individual, DAREK  
KITLINSKI, an individual,  
23 WILLIAM R. SHERMAN, an  
individual, and DOES 1-20,  
24 inclusive,

25 Defendants.  
26  
27  
28

Case No. 3:12-cv-00460-JM-MDD  
3:13-cv-01891-JM-MDD  
3:13-cv-01892-JM-MDD

Honorable Jeffrey T. Miller

**METROPOLITAN'S MEMORANDUM  
OF LAW RE THE BURDEN OF PROOF  
FOR PLAINTIFFS' EPPA PUNITIVE  
DAMAGES CLAIM**

## I. INTRODUCTION

Defendant Metropolitan Interpreters and Translators, Inc. (“Metropolitan”) hereby submits this Memorandum of Law regarding Plaintiffs’ punitive damages claim under the Employee Polygraph Protection Act (“EPPA”).

First, federal courts vary in their application of burden of proof for punitive damages. While Defendants continue to maintain that the evidentiary record developed at trial is woefully inadequate to support a punitive damages claim, if the claim goes to the jury, the Court should use its discretion to require Plaintiffs to prove entitlement to punitive damages by clear and convincing evidence, particularly in light of the dearth of authority awarding punitive damages under EPPA.

Second, Plaintiffs attempt to create a hybrid burden of proof for EPPA by asserting that punitive damages may be established on the basis of *either* reckless disregard or fraud. This is improper. Establishing punitive damages on the basis of fraud is only available for state law claims. But Plaintiffs have voluntarily dismissed *all* state claims, and the only claim left before the jury (EPPA) is based on federal law. Because federal law does not permit an award of punitive damages premised on a theory of fraud, Plaintiffs should be required to meet the clear and convincing evidence burden for their punitive damages claim.

Finally, if Plaintiffs are permitted to adopt a hybrid standard for punitive damages, the Court must require Plaintiffs prove entitlement by clear and convincing evidence. While federal law is less than crystal clear on the required burden of proof for punitive damages, California law is unequivocal – the burden of proof for punitive damages is by clear and convincing evidence. If Plaintiffs rely on state punitive damages’ prongs (here, fraud), they must also be held to the state burden of proof.

Accordingly, Metropolitan respectfully requests that the Court apply the clear and convincing evidence burden of proof to Plaintiffs’ claim for punitive damages

1 under EPPA, and so instruct the jury.

2 **II. THE COURT HAS DISCRETION TO APPLY THE CLEAR AND**  
 3 **CONVINCING BURDEN OF PROOF TO EPPA PUNITIVE**  
 4 **DAMAGES**

5 Plaintiffs claim that the clear and convincing evidence standard never applies  
 6 to federal law claims. Not so. The Ninth Circuit Model Rules supply *both* clear  
 7 and convincing evidence and preponderance of the evidence standards. *See* Ninth  
 8 Circuit Model Civil Jury Instructions 5.5 (2007).

9 Federal courts may apply either preponderance of the evidence or clear and  
 10 convincing evidence burdens of proof to punitive damages claims. *Id.* In fact,  
 11 federal courts have varied on which standard to apply. *See, e.g., In re Exxon*  
 12 *Valdez*, 270 F.3d 1215, 1232 (9th Cir.2001). In *In re Exxon Valdez*, the Ninth  
 13 Circuit noted that several states require proof by clear and convincing evidence  
 14 before awarding punitive damages on state law claims. *Id.* While the court went on  
 15 to apply the preponderance standard to a maritime case, the decision did *not*  
 16 exclude the application of the clear and convincing standard to federal law claims;  
 17 it merely found that the district court did not abuse its discretion in opting for a  
 18 lesser standard. *Id.* at 1232-33 (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1,  
 19 23 n. 11 (1991) (finding the lesser standard of preponderance of the evidence  
 20 “constitutionally sufficient,” but not required, vis a vis the favorable standard of  
 21 clear and convincing evidence)).

22 Thus, the Court has discretion to require the clear and convincing standard of  
 23 proof for punitive damages under federal law. However, a lesser standard is not  
 24 appropriate here, where doubt exists regarding whether punitive damages are  
 25 available at all. Specifically, EPPA does not directly authorize punitive damages  
 26 and a number of courts that have examined this issue have expressed uncertainty  
 27 regarding whether punitive damages are even permissible under EPPA. *See e.g.,*  
 28 *Mennen v. Easter Stores*, 951 F. Supp. 838, 866 (N.D. Iowa 1997) (“Even assuming

1 that an award of punitive damages is available under the EPPA, because the record  
 2 is absent any evidence indicating a willful or reckless disregard for Mennen's  
 3 rights, the court finds that an award of punitive damages is not warranted"); *Lyles v.*  
 4 *Flagship Resort Dev. Corp.*, 371 F. Supp. 2d 597, 609 (D.N.J. 2005) ("The Court  
 5 declines to reach the issue of whether the [EPPA] statute authorizes punitive  
 6 damages, as the Court finds such damages are not justified on the facts of this  
 7 case"). In light of the dearth of authority applying punitive damages to EPPA at all,  
 8 a conservative approach is warranted.

9 Accordingly, this Court should apply the clear and convincing standard of  
 10 proof if it elects to instruct the jury that punitive damages are available at all.

### 11 **III. PLAINTIFFS MAY NOT RELY ON FRAUD TO ESTABLISH** 12 **PUNITIVE DAMAGES LIABILITY**

13 Regardless of which standard applies, the burden of proof for punitive  
 14 damages under federal law requires a finding "that the defendant's conduct that  
 15 harmed the plaintiff was malicious, oppressive or in reckless disregard of the  
 16 plaintiff's rights." Ninth Circuit Model Civil Jury Instructions 5.5 (2007). In fact,  
 17 the instructions state that the jury may *only* award punitive damages if defendants'  
 18 conduct is malicious, oppressive or in reckless disregard. *Id.* Fraud is not an prong  
 19 of punitive damages under federal law; it is only available when establishing  
 20 punitive damages under state law claims. *See* CACI No. 3941 (2015 Edition)  
 21 (permitting a finding of punitive damages under malice, oppression or fraud).  
 22 Thus, because fraud is not a basis for punitive damages for federal law claims,  
 23 Plaintiffs cannot rely on fraud to establish punitive damages under EPPA.

24 *Compare* Ninth Circuit Model Civil Jury Instructions 5.5 *with* CACI No. 3941.

25 Plaintiffs' attempt to fashion a new rule for punitive damages liability by  
 26 cherry picking their favorite portions of state and federal punitive damages  
 27 standards must be rejected.  
 28

**IV. PLAINTIFFS' RELIANCE ON FRAUD REQUIRES APPLICATION OF CLEAR AND CONVINCING BURDEN OF PROOF**

Despite voluntarily dismissing their state fraud claims, Plaintiffs attempt to improperly impute "fraud" into their federal punitive damages claim against Metropolitan for its EPPA violation. But if Plaintiffs are permitted to apply elements of the state punitive damages standard to EPPA (*i.e.*, fraud), then they should be required to prove punitive liability by clear and convincing evidence. *See, e.g., Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1056 (9th Cir. 1997) (punitive damages claims arising under state law are subject to state law standards for recovery which should be reflected in a modified jury instruction). As discussed above, fraud is a component of punitive damages under state law claims, not federal law. And California law explicitly requires a standard of clear and convincing evidence to establish punitive damages. *See* Code Cal. Civ. Code § 3294. Therefore, to the extent Plaintiffs rely on California punitive damages prongs, they should also be held to the California punitive damages standard: clear and convincing evidence.

Plaintiffs' incorporation of California's punitive liability standard should also extend to its underlying principles. In California, an award of punitive damages may not be based on mere speculation, but rather requires a definite showing that the defendant acted willfully, maliciously, and with the intent to vex, harass, annoy or injure the plaintiff. *See Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452 (1974). Additionally, mistakes, mere reckless disregard, or misconduct do not warrant punitive damages. *See, e.g., Henderson v. Security Nat. Bank*, 72 Cal. App. 3d 764, 772 (1977); *Dairy Am., Inc. v. New York Marine & Gen. Ins. Co.*, No. CVF07-0537 LJO SMS, 2010 WL 2555116, at \*10 (E.D. Cal. June 18, 2010); *Dawes v. Superior Court*, 111 Cal. App. 3d 82, 87 (1980); *G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 31-32 (1975). Finally, punitive damages are disfavored under California law and are only allowed in the most outrageous and

1 clearest of cases. *See, e.g., Nolin v. National Convenience Stores Inc.*, 95 Cal. App.  
 2 3d 279, 284-85 (1979); *Henderson*, 72 Cal. App. 3d at 771; *Hawker v.*  
 3 *Bancinsurance, Inc.*, No. CV F 12-1261 LJO SAB, 2013 WL 1281573, at \*13 (E.D.  
 4 Cal. Mar. 26, 2013); *Escriba v. Foster Poultry Farms*, 793 F. Supp. 2d 1147, 1167  
 5 (E.D. Cal. 2011).

6 If the jury is instructed on Plaintiffs' hybrid theory of punitive liability, they  
 7 should also be instructed to apply the state law standard for punitive damages, clear  
 8 and convincing evidence, and to consider the principles which inform the same.

## 9 **V. CONCLUSION**

10 For the reasons stated herein, Metropolitan respectfully requests the Court  
 11 instruct the jury that Plaintiffs' burden of proof for punitive damages under EPPA  
 12 is clear and convincing evidence.

13 Dated: April 15, 2015

MANATT, PHELPS & PHILLIPS, LLP

15 By: s/ Barry W. Lee

16 *Attorneys for Defendants*  
 17 METROPOLITAN INTERPRETERS AND  
 18 TRANSLATORS, INC., and J.C.

**PROOF OF SERVICE**

I, Judy L. Feingold, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On **April 15, 2015**, I served a copy of the within document(s):

**METROPOLITAN'S MEMORANDUM OF LAW RE THE BURDEN OF PROOF FOR PLAINTIFFS' EPPA PUNITIVE DAMAGES CLAIM**



(By ELECTRONIC FILING) I served each of the above referenced document(s) by E-filing in accordance with the rules governing the electronic filing of documents in the United States District Court for the Southern District of California, which will send notification of such filing to the following interested parties

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*Attorneys for Plaintiffs*  
*M.G., F.M., L.A., J.M., L.G., F.B., M.N. and R.G.*

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on **April 15, 2015** at Los Angeles, California.

  
Judy L. Feingold